

## BENIN

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### I. Origins and Historical Development of the Constitution

Since it obtained independence on 1 August 1960 as Dahomey, Benin has had an eventful political and constitutional history. Between 1963 and 1972 the country experienced eight coups, adopted ten constitutions,<sup>1</sup> and had ten Presidents.<sup>2</sup> Three major periods followed independence. The 1960–1972 decade was one of political instability and successive regime changes. Civilian and military regimes alternated. During this period, the country was known to be ‘the sick child of Africa’,<sup>3</sup> in reference to its political turbulence and frequent coups.<sup>4</sup>

The military coup of 26 October 1972 marked the beginning of a second era, when long-serving President General Mathieu Kérékou took power and subsequently established the Benin Revolutionary People’s Party. Kérékou ruled the country under Marxist-Leninist dictatorship for 17 years and imposed a tight ban on freedoms. The regime actively abused the human rights of its citizens and transformed the country into a police state, sending the opposition underground.<sup>5</sup>

In 1989, the oil crisis in neighbouring Nigeria adversely affected Benin’s economy and the pro-USSR regime could not stand the democratic wind that blew in the aftermath of the collapse of the Berlin Wall. The long ban on civil and political rights fuelled growing discontent among domestic social and political forces, which resorted to indefinite strikes and country-wide protests demanding change.<sup>6</sup> These events led to the demise of the regime, which agreed to the idea of the first national conference as part of the so-called ‘third wave’ of democratisation<sup>7</sup> and new constitutionalism in Africa. The

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<sup>1</sup> These are the Constitutions of 28 February 1959, 26 November 1960, and 11 January 1964; the Charter of 1 September 1966; the Constitution of 11 April 1968; the Ordinances of 26 December 1969, 7 May 1970, and 18 November 1974; the Fundamental Law of 26 August 1977 amended by the Constitutional Act of 6 March 1984, and the Constitutional Act of 13 August 1990, which served as a constitution for the transition to democracy.

<sup>2</sup> Six of the coups were successful, while three failed. For a comprehensive discussion of Benin’s political and constitutional history, see P Météhoué, *Les gouvernements du Dahomey et du Bénin: 1957 – 2005* (CNPMS, 2005). See also M Ahanhanzo-Glèlè, *Naissance d’un Etat: l’évolution politique et constitutionnelle du Dahomey, de la colonisation à nos jours* (Paris, LGDJ, 1969) and LB Bio Bigou, ‘La contribution du pouvoir législatif à la vie politique du Bénin de 1965 à 1979’ in Capan (ed), *L’histoire du pouvoir législatif des indépendances à nos jours*, Actes du colloque parlementaire du cinquantenaire (Porto-Novo, 2011) 81.

<sup>3</sup> See N Dossou-Yovo, ‘The Experience of Benin’ (1999) 16 *Journal on World Peace* 59 and GriooCom ‘Bénin: de l’enfant malade au modèle démocratique’ at [http://www.grioo.com/ar,benindeenfant\\_maladeaumodeledemocratique,19522.html](http://www.grioo.com/ar,benindeenfant_maladeaumodeledemocratique,19522.html).

<sup>4</sup> See BA Magnusson, ‘Testing Democracy in Benin’, in Richard Joseph (ed), *State, Conflict and Democracy in Africa* (London, Lynne Rienner Publishers, 1999) 221.

<sup>5</sup> See Magnusson (n4) and A Rotman, ‘Benin’s Constitutional Court: An Institutional Model for Guaranteeing Human Rights’ (2004) 17 *Harvard Human Rights Journal* 283.

<sup>6</sup> See J Aivo, ‘Constitution de la République du Bénin, La Constitution de tous les records en Afrique’ (2010).

<sup>7</sup> See C Fombad and NA Inegbedion, ‘Presidential Term Limits and Their Impact on Constitutionalism in Africa’, in C Fombad and C Murray (eds), *Fostering Constitutionalism in Africa* (2010) PULP 7–8.

renowned *Conférence des forces vives de la nation* was held in February 1990.<sup>8</sup> Constitutional and liberal democracy, the rule of law, separation of powers, and human rights have been at the heart of this third era of democratic revival which the country is still experiencing.

In the pursuit of these objectives set by the National Conference,<sup>9</sup> the new Constitution of Benin was the result of a popular endeavour through the 11 December 1990 Referendum. Although the debates around the adoption of the 1990 Constitution focused on democratisation and the protection of fundamental rights due to the grave violations of the past, the new Constitution also addressed traditional issues that are dealt with in any such document of its kind. Importantly, as a democratic era constitution, the document sought to heal the Benin political and constitutional instability syndrome. It therefore marked a radical change from its predecessors.

The frequent change of constitutions between 1960 and 1972 had its roots in political and ideological disputes among the elite. To understand constitutional instability in Benin in the independence decade, one should look into the country's ethnic heterogeneity. Besides the constant presence of the army, the 'north-south' divide had an important bearing in fierce political disputes, which in turn caused a frequent change of constitution. Suspicion and distrust between political leaders from different regions of the country<sup>10</sup> even led to the unusual phenomenon of a collegial presidency with three heads of state, known as 'presidential *triumvira*', experienced between 1970 and 1972.<sup>11</sup>

However, major political events, both internal and international, have equally influenced frequent constitutional changes. For instance, the first constitution of the country, the Constitution of 28 February 1959,<sup>12</sup> was a replica of the French Constitution, the President of France at the time being also President of the Africa French Union. As an important political event, it was therefore no surprise that the country's independence came with a new constitution. The aim was to establish a new sovereign state and afford local citizenship and related privileges to the inhabitants of the then Dahomey. However, the country's post-independence instability began before the newly-elected president could complete his term. The independence Constitution of 26 November 1960 lasted less

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<sup>8</sup> See K Nwajiaku, 'The National Conferences in Benin and Togo Revisited' (1994) 32 *Journal of Modern African Studies* 439–440.

<sup>9</sup> Benin's National Conference was a popular assembly that brought together representatives of teachers, students, the military, government officials, religious authorities, non-governmental organisations, more than 50 political parties, ex-presidents, labours unions, business interests, farmers, and dozens of local development associations. See Magnusson (n4) 221.

<sup>10</sup> Hubert K Maga represented the North, Justin T Ahomadégbé originated from the central part of the country, and Sourou M Apithy came from the South East.

<sup>11</sup> See Aivo (n6). Although the history of nation-building has gained in strength in the democratic era, ethnic—and especially the north-south—divide is still used by political leaders, particularly when the stakes are high, such as during presidential elections.

<sup>12</sup> It remained in operation for only 21 months.

than three years, after which President Maga was deposed by General Soglo through a military coup in 1963.

The 28 October 1963 coup therefore put an end to the independence Constitution, which was replaced by the Constitution of 11 January 1964.<sup>13</sup> Over the following eight years, Benin adopted four other constitutions,<sup>14</sup> including one after the 10 December 1969 coup through which the military deposed and arrested President Emile Derlin Zinsou.<sup>15</sup> Political tension increased between civilian leaders until 1972, when the military seized power again in a purported bid to respond to the political disorder and instability it believed to be the feature of civilian ruling.

Apart from actually resolving Benin's instability, the 26 October 1972 coup, led by then Commander Mathieu Kérékou, also marked the end of liberal constitutionalism<sup>16</sup> adopted by all previous constitutions.<sup>17</sup> The 1972 coup inaugurated a 'Marxist constitutionalism' and its founding document established the 'Military Revolutionary Government'.<sup>18</sup> The military regime subsequently enacted a new Fundamental Law on 26 August 1977 as the legal basis of the new constitutionalism thus adopted.<sup>19</sup> The Marxist-Leninist Constitution was in operation for 13 years, with a military and one-party regime as the principal features, as alluded to earlier. Political violence and systematic rights violations were the main characteristics of the state. In fact, the country had to endure dictatorial rule for the political and constitutional stability obtained through the new order. The regime was one of confusion between the state, the one-party regime, and their organs; and of the denial of individual fundamental rights.

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<sup>13</sup> This was adopted by referendum and remained in force for 2 years and 9 months.

<sup>14</sup> These constitutions or equivalent documents included those dated 1 September 1966 (19 months), 11 April 1968 (21 months), 26 December 1969 (adopted by a military directorate following a military coup—4 months), 7 May 1970 (under which the military handed power to a civilian three-member presidential council, known as *triumvira*—2 years and 5 months).

<sup>15</sup> Zinsou was the President of Benin (then Dahomey) from 17 July 1968 to 10 December 1969 with the support of the military after they took power through the 1968 coup.

<sup>16</sup> Liberal constitutionalism is defined as constituting the following elements: (1) a higher law, either written or unwritten, called a constitution; (2) judicial review; (3) an independent judiciary comprised of independent judges dedicated to legal reasoning; (4) possibly, due process of law; and (5) most basically, a binding procedure establishing the method of law-making which remains an effective brake on the bare-will conception of law. See B Li, 'What Is Constitutionalism?', at [\[http://www.ovcf.org/Perspectives2/6\\_063000/what\\_is\\_constitutionalism.htm\]](http://www.ovcf.org/Perspectives2/6_063000/what_is_constitutionalism.htm). See also RS Turner, 'Neo-Liberal Constitutionalism: Ideology, Government and the Rule of Law' (2008) 1 *Journal of Politics and Law* 47–55 and HN Hirsch, 'Association and Exclusion: The Paradox of Liberal Constitutionalism' (2011) 3 *Amsterdam Law Forum* 27–42.

<sup>17</sup> See I Salami, *Receuil des textes constitutionnels du Bénin*, Introduction (draft book on file with author, for publication in 2012).

<sup>18</sup> The document was in fact an Ordinance no 74-68 of 18 November 1974 (adopted by a military directorate following a military coup). It remained in force for 13 years until the National Conference was organised and the 1990 Constitution was adopted.

<sup>19</sup> The Fundamental Law of 26 August 1977 (adopted under the Marxist military rule—13 years), which remained in force until the National Conference was organised and the 1990 Constitution was adopted.

The Marxist regime was dismantled by the National Conference of 1990. The Conference also led to a new constitutional dispensation that was meant to regulate political life during the one-year transition to the democratic era. The Constitutional Law of 13 August 1990 was adopted by the High Council of the Republic, which served as the parliament during the transition. The constitutional document sealed the National Conference's deal to maintain Kérékou as the President of the Republic, while the Executive was to be headed by Nicéphore D Soglo, a Prime Minister designated by the Conference. Five months later, the Constitution of 11 December 1990 was adopted. It has been in operation for more than two decades at the time of writing, with the peculiarity of having never been amended. Its drafting history has certainly had a great bearing on the strong opposition to its amendment, as referred to below.

As indicated above, Benin's return to democracy was rooted in the popular struggle, which led to the demise of 17 years of the Marxist-Leninist dictatorial regime in March 1990. The ultimate achievements of the February 1990 Benin National Conference included the establishment of a Constitutional Commission. The Commission was tasked to draft a new constitution emphasising a strong rejection of dictatorship, one-man power, and disrespect for the rule of law, which were the main features of the previous regime. The Commission was also mandated to lay the foundation for the new constitutional order on the 'promotion and the protection of human rights, as proclaimed and guaranteed by the African Charter on Human and Peoples' Rights (African Charter)',<sup>20</sup>

Against this socio-political and historical background, the 1990 Constitution opted for a presidential regime, separation of powers, the rule of law, human rights, and other common features of modern constitutionalism. In addition to establishing check and balance institutions, the new fundamental law set up a Constitutional Court, with direct access for individuals. Individuals were therefore empowered not only to secure the enforcement of their personal rights but also to challenge the constitutionality of laws and acts of the state, its organs, and agents. After two decades of practice, the results of this 'constitutional revolution' speak for themselves. The country has never missed any of its presidential, legislative, and municipal elections since 1991. It has experienced three changes of government and three presidents succeeded one another in power.<sup>21</sup> This said, apart from the history of its drafting, the role of political and civil society actors and the supervision of the Constitutional Court must be taken into account in understanding the stability brought about by the 1990 Constitution that has positioned Benin as a model in the region.

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<sup>20</sup> JR Heilbrunn, 'Social Origins of National Conferences in Benin and Togo' (1993) 31 *Journal of Modern African Studies* 112.

<sup>21</sup> These are Nicéphore Soglo (1991–1996), Mathieu Kérékou I (1996–2001), Mathieu Kérékou II (2001–2006), Boni Yayi I (2006–2011), and Boni Yayi II (2011–2016).

The Constitution includes a preamble and 160 articles under 12 titles. Title I is devoted to the state and sovereignty, title II to the rights and duties of the person, title III to executive power, title IV to legislative power, title V to the Constitutional Court, title VI to the judiciary, the Supreme Court, and the High Court of Justice, title VII to the Economic and Social Council, title VIII to the High Authority for Audiovisual and Communication, title IX to treaties and international agreements, title X to local government, title XI to the revision of the Constitution, and title XII to transitory and final provisions.

## **II. Fundamental Principles of the Constitution**

Given the political unrest and civil rights' restraints suffered during the dictatorship, it was no surprise that the 1990 Constitution set very liberal goals for building a new nation. The Constitution provides for main constitutional principles, including liberal democracy, the rule of law, separation of powers, and respect for fundamental rights.<sup>22</sup> In the preamble, the people express their determination to:

- Oppose any political regime based on arbitrariness, dictatorship, injustice, corruption, regionalism, nepotism, confiscation of power, and personal power;
- Create a state based on the rule of law and plural democracy, where fundamental human rights and freedoms, human dignity, and justice are upheld, protected, and promoted as the necessary condition for each Beninese to enjoy development in its temporal, cultural, and spiritual dimensions; and
- Defend and safeguard their dignity in the face of the world and regain their place and role as pioneers of democracy and the defence of human rights which they once held.

This preliminary enunciation of principles in the preamble has been spelt out in provisions of the Constitution. Article 2 of the Constitution provides that 'the Republic of Benin is one and indivisible, secular and democratic; its principle is government of the people, by the people and for the people'. Article 3(1) of the Constitution restates the principle of democracy through 'national sovereignty', which is said to 'belong to the people'. As mentioned above, the history of Benin reveals that power was frequently seized by unconstitutional means, namely through *coups d'Etat*. One-man rule was also part of the political history of the country for decades, and officials or state institutions could repeal legislation as pleased them. Hence, the principle of national sovereignty was provided in the same provision as the 'supremacy of the Constitution'. The presence of those principles in the same provision could imply that only the sovereign people may legitimately entertain constitutional changes, directly through the power of the ballot or indirectly through their representatives in

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<sup>22</sup> For a commentary on the goals and principles of the Constitution see Fondation Konrad Adenauer, *Commentaire de la Constitution béninoise du 11 décembre 1990: esprit, lettre, interprétation et pratique de la constitution par le Bénin et ses institutions* (2009) 15.

Parliament. When it comes to amending key constitutional principles, as discussed below in greater detail, the Constitutional Court of Benin seems to afford an even higher consideration to the direct expression of the people over the decision of their representatives.<sup>23</sup> Considering who has legitimacy to entertain amendments of the Constitution, the Constitutional Court has held that since some principles of the Constitution proceeded from the people and the sovereign National Conference, no single entity had enough legitimacy to amend them without reverting to the people.<sup>24</sup> The principle of ‘national consensus’, thus raised by the Court to the rank of a ‘constitutional principle’, was derived from the sovereignty of the people through the National Conference.

The 1990 Constitution has also made provisions for the rule of law and its protection. As one of the peculiarities of the constitutionalism inaugurated in 1990, individuals may challenge the constitutionality of any law or act in the Constitutional Court.<sup>25</sup> The Court was therefore well positioned to play a prominent role in upholding the rule of law, which it did right from the beginning. In the early years of its operation, the Court, in DCC 33-94, termed itself ‘the cornerstone of the liberal rule of law’ and the ‘keystone of the entire politico-legal system’.<sup>26</sup>

Political parties are placed at the heart of the electoral machinery in Benin, and Article 5 of the Constitution obligates them to operate in conformity with principles of national sovereignty, democracy, integrity of the territory, and secularity of the state.<sup>27</sup> Article 5 materialises the multi-party option decided at the National Conference, although freedom of association allows individuals to run for elective positions. The President, Members of Parliament, and municipal councillors are elected by universal suffrage, which is equal and secret.<sup>28</sup> Universal suffrage is a consequence of sovereignty and a feature of liberal democracy.

Human rights constitute a central axis of Benin’s 1990 Constitution. The African Charter is given precedence over other international norms, including the Universal Declaration of Human Rights (UDHR). The preamble to the Constitution includes a reference to the African Charter. The rights and

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<sup>23</sup> See Centre pour la Gouvernance Démocratique au Burkina Faso, ‘Constitutionnalisme et révisions constitutionnelles en Afrique de l’ouest: le cas du Bénin, du Burkina Faso et du Sénégal’ (2009), at [<http://ddata.observblog.com/1/35/48/78/Burkina-Faso/CONSTITUTIONNALISME-ET-REVISION-CGD.pdf>].

<sup>24</sup> See Benin Constitutional Court Decision DCC 06-074 of 8 July 2006. In Benin’s constitutional practice, cases are not named as the South African *Treatment Action Campaign* and *Grootboom* or the Bostwanian *Unity Dow*. Rather, they are numbered as DCC (for *Décision de la Cour Constitutionnelle*) followed by the two last numbers of the year and the number of the case. Accordingly, DCC 06-074 of 8 July 2006 should be read as the 74<sup>th</sup> decision of the Constitutional Court delivered in 2006, on 8 July. In a very few instances, the number of the case comes before the year, such as DCC 33-94 of 24 November 1994. DCC is replaced with EL for decisions relating to electoral matters.

<sup>25</sup> Art 3(2) of the Constitution. The Constitutional Court of Benin has developed an extensive jurisprudence on the constitutionality of legislation, including bills originating from both Parliament and the government. See Cour constitutionnelle du Bénin ‘Contrôle de constitutionnalité’, at [<http://www.cour-constitutionnelle-benin.org/courconsbj.html>].

<sup>26</sup> See DCC 33-94 of 24 November 1994.

<sup>27</sup> See Art 5 of the Constitution.

<sup>28</sup> See Art 6 of the Constitution.

duties of the Charter are made part and parcel of the Constitution through the first provision of the Bill of Rights: Article 7 of the Constitution. The full text of the Charter is also annexed to the Constitution. Two mechanisms were designed for the enforcement of the rights enshrined in the Constitution. A Constitutional Court was established with an express human rights mandate, and direct access was granted to individuals and groups to file human rights complaints.

Besides separation of powers, which is discussed further under Section IV, Benin's 1990 Constitution has provided for safeguards to prevent the military from intervening in political life. Arguably, the need to circumscribe the military's intervention is reasoned by its frequent incursions into the political arena in the past. As a consequence, one of the very few times the word 'military' is mentioned in the Constitution is in Article 34, which makes it a 'duty for all citizens, civilians and the military to respect the Constitution and constitutional order in all circumstances'. The Constitution also prevents members of the armed forces from standing for elective positions<sup>29</sup> or sitting in the cabinet<sup>30</sup> unless they have retired or resigned well ahead of the considered election.<sup>31</sup> In 2007, when the country was confronted with the intervention of the military to support election management by transporting material, the Constitutional Court re-affirmed the independence and administrative autonomy of the National Autonomous Electoral Commission, in EL 07-001.<sup>32</sup> Approached in a similar situation on the occasion of the 2010 parliamentary election, the Court threw out the application in DCC 10-116 on the basis that its previous decision on the matter was final and thus not open to appeal.<sup>33</sup> Although the military eventually supported the Electoral Commission, the Court had made it clear that its intervention must remain within constitutional prescriptions in the new order.

### **III. Fundamental Rights Protection**

#### **A. The Spectrum of Rights**

Like the constitutions of most African countries, Benin's Constitution includes references to the UDHR and the African Charter in the preamble. However, the first article of the Bill of Rights illustrates the strong fingerprint of African Charter rights in the Constitution. Article 7 thus makes 'all the rights and duties of the African Charter part and parcel of the Constitution and of Beninese law'. The first implication is that all the rights missing or limited in the Constitution—eg peoples' rights—are made constitutional human rights by the African Charter. Another consequence is that stronger protection is potentially afforded by the African Charter to the human rights entrenched in the

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<sup>29</sup> According to Article 51 of the Constitution, members of the military cannot stand for presidential elections.

<sup>30</sup> Art 54(4) of the Constitution.

<sup>31</sup> Art 64(1) of the Constitution. The time-frame within which such resignation should be filed is determined by the law.

<sup>32</sup> See EL 07-001 of 22 January 2007.

<sup>33</sup> See DCC 10-116 of 8 September 2010.

Constitution. Over the past two decades, the African Charter has remained at the heart of the constitutional protection of human rights in Benin.<sup>34</sup> The specific mandate of the Constitutional Court to receive individual human rights complaints has made such entrenchment both relevant and effective.

This strong provision for human rights protection is arguably justified by the fact that at the time of the drafting of the document, the debate was still alive as to whether preambles had the same value as provisions of the Constitution.<sup>35</sup> An interpretative reading of the drafting history of Benin's 1990 Constitution suggests that constitutional law scholars and practitioners within the drafting commission failed to agree on the question and thus resorted to an extended African Charter rights incorporation in the text of the new Constitution, through its Article 7.<sup>36</sup>

## **B. The Scope of Rights**

Title II of the Constitution is devoted to the Bill of Rights and entitled 'Rights and Duties of the Person'. It comprises 35 articles (from Article 7 to Article 40) which enshrine both rights and duties of the person. All categories of rights are enshrined in the Constitution of Benin. Despite the full inclusion of African Charter rights, the Constitution enumerates a list of rights.

Civil and political rights covered include:

- the right to life, liberty, security, and integrity;
- the right not to be forced to exile;
- fair trial rights, presumption of innocence, and non-retroactivity of criminal law;
- freedom from torture and inhuman and degrading treatment;
- inviolability of the home, secrecy of correspondence, freedom of thought, conscience, religion, belief, opinion, and expression;
- freedom of the press;
- freedom of movement, association, reunion, procession, and demonstration;
- equality before the law without distinction of origin, race, sex, religion, political opinion, or social position; and
- equality of men and women, protection of the family, mother and the child, the disabled, and the aged.

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<sup>34</sup> On the place and role of the African Charter in the constitutional protection of human rights in Benin, see in general AL Sidi, 'La protection des droits humains par la Cour constitutionnelle du Bénin de 1993 à 2005', *Mémoire de DEA Chaire UNESCO Université d'Abomey-Calavi* (2006) and H Adjolohoun, *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (Paris, L'Harmattan, 2011).

<sup>35</sup> Only the French Court of Cassation took the position, in its decision 71-44 16 July 1971, that provisions of the preamble to the French Constitution carry the same weight as constitutional provisions.

<sup>36</sup> See in general S Bolle, 'Des Constitutions "Made in Afrique"', at [<http://www.droitconstitutionnel.org/congresmtp/textes7/BOLLE.pdf>] and M Ahanhanzo-Glèlè, 'Le Renouveau Constitutionnel du Bénin: une énigme?', in Michel Alliot, *Liber Amicorum* (1999).

Socio-economic and cultural rights include:

- equal access to<sup>37</sup> health, education, culture, information, professional training, and employment;
- the right to culture, and the state's duty to safeguard and promote national values of civilisation and traditional cultures;
- freedom to use communities' languages, and the state's duty to promote national inter-communication languages;
- the state's and decentralised entities' duty to guarantee the education of the child;
- the state's duty to provide for the education of youth, free primary education, and progressive gratuity of public education;
- the right to property; and
- the right to work, just pay, and the right to strike, and trade unions.

Finally, solidarity rights are entrenched as follows:

- the right to development and full self-realisation in material, temporal, intellectual, and spiritual dimensions; and
- the right to a clean, satisfying, and sustainable environment.<sup>38</sup>

### **C. Enforcement**

In addition to the strong protection of human rights in the light of the African Charter, Benin's Constitution has provided for judicial and supervisory mechanisms for the enforcement of these rights. The Constitutional Court is without doubt the most important and most empowered of these mechanisms. Notably, constitutional human rights provisions bind all categories of both public and private subjects. Private persons, the state and state agencies, and social organisations as well as corporate entities are bound by these rights as there is no special derogation provided under the Constitution for the breach of human rights. Public institutions and officials or private entities bound by constitutional human rights include the police and armed forces,<sup>39</sup> judges,<sup>40</sup> ministers,<sup>41</sup> court

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<sup>37</sup> In addition to the fact that many of these constitutional human rights are limited by the law, the language in which they are written may also constitute an inherent limitation to the fullest enjoyment of some of them. It is, for instance, noted that the Constitution provides not for the 'rights to' health and education as such, but only for an 'equal access to' those rights. Conversely, the state has a duty to 'guarantee' the education of the child, while development is provided as a 'right to'.

<sup>38</sup> The Constitution provides that the disposal of toxic waste from national industry shall be regulated by the law (Art 28) and the introduction of non-national toxic waste is made a crime against the nation (Art 29).

<sup>39</sup> Police officers, including the Director General of Police, have personally been found in violation of human rights in DCC 06-057, DCC 06-059, and DCC 06-060 (violation of Article 5 of the African Charter, degrading treatment; reparatory order), DCC 06-062 (violation of Article 6 of the African Charter, illegal arrest; reparatory order).

presidents and registrars,<sup>42</sup> public education bodies, the secretary general of the government, and private companies.<sup>43</sup>

One novelty of Benin's 1990 Constitution compared with other constitutions in Africa, especially in Francophone Africa, is certainly the human rights mandate of the Constitutional Court. As mentioned above, the Court has specific jurisdiction to entertain human rights suits brought by individuals and groups.<sup>44</sup> Direct individual access is provided in cases of human rights violation by private persons, the state, its agencies, or any other entities. In addition, indirect access is provided through the 'exception of unconstitutionality', whereby proceedings before ordinary courts are suspended pending the decision of the Constitutional Court.<sup>45</sup> Individuals may also initiate constitutional test or review when they believe a bill, legislation, or act of state organs are not in accordance with the provisions of the Constitution or may violate human rights. The Court has developed liberal rules for individual access<sup>46</sup> and has enjoyed a popular confidence among Beninese. In 2011, the Court had decided about 1,000 cases relating to human rights.<sup>47</sup>

A problem with the human rights mandate of the Constitutional Court is that no provision in the Constitution expressly grants power to the Court to provide remedies, let alone evaluate the quantum of compensation, when it finds that a violation has occurred. However, the right to remedy and reparation is self-evident by reference to the African Charter and the jurisprudence of the African Commission on Human and Peoples' Rights.<sup>48</sup> Moreover, the Constitutional Court has an express human rights mandate and its decisions are final and binding on state and non-state parties.<sup>49</sup> In its early years (1993–2001), the Court adopted a restrictive approach to its human rights jurisdiction. It limited its decisions to declaratory orders and findings of violations. However, from 2002, it

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<sup>40</sup> See, for instance, Constitutional Court decisions DCC 03-084 of 28 May 2003 (15 years investigation without judgment, undue delay, violation by the Tribunal of First Instance of Lokossa of Article 7-d of the African Charter) and DCC 03-125 of 20 August 2003 (violation of Article 7-c of the African Charter, right to defence, violation of Article 35 of the Constitution by the investigating judge).

<sup>41</sup> Both ministers and their offices were found in violation of human rights. See, for instance, Constitutional Court decisions DCC 01-058 of 27 June 2001, where the Ministry of Education was found in violation of Article 26 of the Constitution (equality before the law) for having allowed a teacher access to compete for a professional exam but refused access to a colleague of the same category, specialisation, and criteria; DCC 05-067, DCC 06-016 (involving the Minister of Justice for violation of the right to equality and refusal to execute the decision of the Constitutional Court), and DCC 06-052 (involving the Minister of Education).

<sup>42</sup> See DCC 05-114, DCC 05-127 (involving the Chief Registrar of the Supreme Court), DCC 06-046, and DCC 06-113.

<sup>43</sup> For an overview of the human rights case law of the Constitutional Court of Benin, visit [<http://www.cour-constitutionnelle-benin.org/>].

<sup>44</sup> See Art 114 of the Constitution.

<sup>45</sup> See Art 122 of the Constitution.

<sup>46</sup> See C Gangnon, 'Les Droits Fondamentaux de la Personne Humaine' Séminaire de formation des journalistes, Cotonou 2 August 2005 (unpublished conference paper on file with the author) 1.

<sup>47</sup> See in general N Médé, *Les grandes décisions de la Cour constitutionnelle du Bénin* (2012) Editions Universitaires Européennes and Adjolohoun (n34). Decisions of the Court are available on its website at [<http://www.cour-constitutionnelle-benin.org/courconsbj.html>].

<sup>48</sup> See G Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 442 and N Enonchong, 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?' (2002) 46 Journal of African Law 197–215.

<sup>49</sup> See Art 124(2) of the Constitution.

inaugurated an ‘era of reparation’,<sup>50</sup> although award of reparation still applied on an inconsistent and unprincipled basis. Clear reparation orders with specific quantum for monetary compensation and injunctions to public authorities have been made in a few cases, some of which the government has still refused to comply with.<sup>51</sup> The victims collected monetary compensation in very few instances, following new proceedings in ordinary courts to have the Constitutional Court orders enforced.<sup>52</sup> The government-led process that began in 2008 to amend the Constitution includes an express provision for the right to remedy and reparation for human rights violations.<sup>53</sup>

Perhaps due to the fact that violations of fundamental rights were frequent in the era preceding the operation of the 1990 Constitution, related matters have stolen the limelight in constitutional litigation. How the Constitutional Court adjudicated some of those issues is therefore of interest. For instance, it was called upon, in DCC 99-051, to determine whether provision for the death sentence in Article 381 of the Benin Criminal Code was in violation of Article 8 of the Constitution, which provides that the ‘human person is sacred and inviolable’ and Article 15, which states that ‘everyone has the right to life’. The Constitutional Court answered in the negative.<sup>54</sup> The Court took the position that there is no express or implicit abolition of the death penalty, and concluded that the unqualified right to life cannot in itself mean the inconsistency of the death penalty provision in the criminal law. Considering its express human rights mandate and related powers, the Constitutional Court ought to have advanced the constitutional right to life by setting a more progressive precedent for other courts,<sup>55</sup> namely the Supreme Court.<sup>56</sup> The on-going process to amend the 1990 Constitution includes the abolition of the death penalty.<sup>57</sup>

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<sup>50</sup> In DCC 02-052 of 31 May 2002, the Court decided that human rights violations must ‘open up a right to reparation’ based on the African Charter and international jurisprudence, including from the European Court of Human Rights.

<sup>51</sup> The best illustration of the government’s non-compliance is certainly in DCC 06-016 of 31 January 2006, where the Constitutional Court declared that the government had violated the *res judicata* of its decision DCC 05-067 of 12 July 2005 that the complainants ‘must be included’ in the training of magistrates as their other colleagues, and thus decided that the Minister for Justice had violated the Constitution and that the complainants be reinstated.

<sup>52</sup> An accurate research account of one isolated Constitutional Court decision, DCC 02-058 of 4 July 2002, was given effect by the Tribunal of First Instance of Cotonou Judgment No 07/04/Fourth Civil Chamber of 9 February 2004. The complainant collected a monetary award of about \$10,000 for having suffered severe beatings at the hands of the body guards of the President of the Republic. See Adjolohoun (n34 above).

<sup>53</sup> See proposed Art 125(4), Decree No 2009-548 of 3 November 2009, by which the government transmitted an amendment bill to Parliament.

<sup>54</sup> In DCC 99-051 of 13 October 1999.

<sup>55</sup> For instance by referring to the more encompassing and progressive wording of Article 4 of the African Charter and the findings of the African Commission in *Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

<sup>56</sup> For instance, in the *Azonhito* (death penalty) case, the Supreme Court took the view that the constitutional provision for the right to life did not amount to abolition of the death penalty. See *Azonhito and ors v Public Prosecutor*, Cassation decision, 034/CJ-P; ILDC 1028 (BJ 2000), 29 September 2000. For the full judgment and analysis on the case, see H Adjolohoun, Analysis of the case of *Azonhito and ors v Public Prosecutor*, Cassation decision, 034/CJ-P; ILDC 1028 (BJ 2000) in International Law in Domestic Courts, at [http://www.oxfordlawreports.com/subscriber\\_article?script=ves&id=oril/Cases/law-ildc-1028hj00&recno=4&module=ildc&category=Benin](http://www.oxfordlawreports.com/subscriber_article?script=ves&id=oril/Cases/law-ildc-1028hj00&recno=4&module=ildc&category=Benin).

<sup>57</sup> See Decree No 2009-548 of 3 November 2009 of the President of the Republic transmitting the amendment bill to Parliament.

The contribution of the Constitutional Court to the improvement of police practices and judicial proceedings is also worth noting. For instance, the Court has made quite a purposive construction by borrowing from the work of United Nations treaty bodies in cases of cruel, inhuman, and degrading treatment. In several instances, starting from DCC 98-065, the Court has consistently held that in deciding whether violations have occurred, focus should be placed on intention, effects, and duration of the treatment.<sup>58</sup> With regard to the constitutional obligation for courts to complete proceedings within a reasonable time, the Constitutional Court has, right from DCC 03-119, set the factors of reasonable time as depending on ‘circumstances of the case, complexity and multiplicity of procedures, the applicant’s behaviour and the behaviour of jurisdictional authorities’.<sup>59</sup> In other instances, the Court found undue delay in processes where a ‘flagrant case’ lasted fourteen months,<sup>60</sup> no decision was reached in fourteen-year first instance proceedings,<sup>61</sup> and criminal proceedings have been continuing for twenty years without an outcome.<sup>62</sup>

Other important constitutional human rights to which the Constitutional Court has greatly contributed to the development of are equality and non-discrimination. In DCC 96-067, while deciding a labour case, the Court defined equality as ‘a general principle according to which the law must be the same for all and must not include any discrimination that is unjustified’, thus concluding that ‘persons of the same category must be treated alike with no discrimination’.<sup>63</sup> It was no surprise that when checking the constitutionality of Benin’s 2004 Family Code, the Constitutional Court held, in DCC 02-144, that ‘there is unequal treatment between men and women in that the option provided under article 143(2) of the Code, allows the man to embrace polygamy while the woman may only be monogamous’.<sup>64</sup> In 2009, the Court took the same approach to discrimination as unjustified differentiation. In DCC 09-081, the Court thus declared Articles 333 to 336 of the Criminal Code unconstitutional for providing that the adultery of the man is constituted only when committed in the marital home, while the act of the woman was constituted wherever it took place.<sup>65</sup> The Court, however, allowed positive discrimination when it held, in DCC 01-005, that ‘the law-maker may derogate the principle of equality for persons with disabilities concerning public service regulations for reasons relating to public interest and the continuity of the public service ... provided that specific measures are undertaken to their benefit’.<sup>66</sup> In DCC 12-106, decided in 2012, the Constitutional Court confirmed its

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<sup>58</sup> See for instance DCC 98-065 of 5 August 1998, DCC 99-011 of 4 February 1999, DCC 03-088 of 28 May 2003, DCC 96-084 of 13 November 1996, and DCC 98-100 of 23 December 1998.

<sup>59</sup> DCC 03-119 of 28 August 2003 and DCC 03-167 of 11 November 2003.

<sup>60</sup> DCC 97-006 of 18 February 1997. According to the relevant provisions of the criminal code of procedure, ‘flagrant cases’ or those in which the offender is ‘caught in the act’ are dealt with under a more expedited procedure than other cases. See Arts 19, 20, 27, 40, and 48–75 of Benin’s new Code of Criminal Procedure, Loi n° 2012-15 portant code de procédure pénale en République du Bénin, 30 March 2012.

<sup>61</sup> DCC 97-011 of 6 March 1997.

<sup>62</sup> DCC 03-144 of 16 October 2003.

<sup>63</sup> DCC 96-067 of 21 October 1996.

<sup>64</sup> DCC 02-144 of 23 December 2002.

<sup>65</sup> See DCC 09-081 of 30 July 2009.

<sup>66</sup> DCC 01-005 of 11 January 2001.

precedent on non-discrimination and found discriminatory the decision of the Ministry of Labour to reject the visually impaired complainant's application for the magistracy entrance examination. The Ministry had justified its decision by the fact that the positions were not accessible to candidates who use brail.<sup>67</sup>

#### **IV. Separation of Powers**

Benin's 1990 Constitution opted for separation of powers between an executive power exercised by the government, legislation being left to the National Assembly, and judicial power falling within the competence of courts and tribunals.<sup>68</sup>

In practice, separation of powers under the Constitution is eroded by strong prerogatives afforded to the President of the Republic to both make the law and exert influence on public administration, the armed forces, the Judiciary, and other state institutions, including the Communication and Media Authority, the Social and Economic Council, and the Ombudsman. The main issues have to do with how the President uses his appointment powers and special powers to issue ordinances.

##### **A. The Executive**

###### **1. Election**

Under its Constitution, Benin adopts a presidential system of government with a limit of two five-year presidential terms.<sup>69</sup> Article 44 sets six main eligibility conditions for presidential candidates.<sup>70</sup> The condition which has attracted most political suspicion is probably that of six-month residence 'at the time of the particular election'. The Constitutional Court was called to determine the 'time of the election' on two occasions, in 2006 and 2011. In EL-P 06-002, the petition was submitted before the publication of the final list of candidates and was thus declared premature.<sup>71</sup> Upon publication of the list, a new petition on the same issue, in EL-P 06-014, was rejected for lack of standing.<sup>72</sup> The Court seemed, however, to have resolved the issue while checking the constitutionality of the 2005 Code for presidential elections in which the Parliament defined 'the time of the elections' as the period running from the inauguration of the Electoral Commission to the proclamation of the final results.<sup>73</sup> In DCC 05-069, the Constitutional Court held that 'by determining the period as set in the law, law-makers have set a supplementary condition relating to the duration of residence', while the only condition set by the Constitution is the one of residence.<sup>74</sup> In the 2011 presidential election, the Court authorised the

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<sup>67</sup> DCC 12-106 of 3 May 2012

<sup>68</sup> See Arts 3, 4, and 6 of the Constitution.

<sup>69</sup> Art 42 of the Constitution.

<sup>70</sup> These are nationality, morality, civil and political rights, aged between 40–70 years, residence 'at the time of election', and physical and mental health.

<sup>71</sup> See Decision EL-P 06-002 of 19 January 2006.

<sup>72</sup> See Decision EL-P 06-014 of 28 February 2006.

<sup>73</sup> Art 5 of the Loi No 2005-26 Portant Règles Particulières pour l'Élection du président de la République.

<sup>74</sup> DCC 05-069 of 27 July 2005.

candidature of a non-resident national in the same circumstances as in 2006. By adopting such a position, the Court has upheld equality and belied public belief that it had interpreted the rule to serve a particular candidate in 2006.

## **2. Appointment, Law-making and Special Powers of the President**

Apart from appointing members of the Cabinet, the President's appointment powers<sup>75</sup> are extended to top public administration and army officers, as well as diplomats. More importantly, the President appoints three of the seven members of the Constitutional Court and the President and Members of the Supreme Court, although from a list prepared by the *Conseil Supérieur de la Magistrature* (High Council of Magistracy). The Council, which is tasked with recruiting, training, and managing the careers of magistrates and judges, is chaired by the President of the Republic and includes the Minister of Justice.

The President of the Republic is also vested with law-making powers received directly from the Constitution. Firstly, the President shares the 'initiative of laws' with the National Assembly, and while 'propositions of law' (parliament bills) are introduced by members of the Assembly, the President is given the power to make the law through 'projects of law' (government bills).<sup>76</sup> The President also promulgates new legislation passed by Parliament, adopts regulations, and has the initiative of referendum.<sup>77</sup>

The President's power to issue special measures has been at the heart of disputes with other branches of the state. Under Article 68 of the Constitution, the President of the Republic may 'issue exceptional measures required by the circumstances without the citizens' constitutional rights being suspended'. The main condition is for the circumstances to include 'when institutions, the nation, the territory, execution of international commitments, functioning of public institutions are threatened or interrupted'. Presented with a petition challenging abuse of presidential special powers, the Constitutional Court held, in DCC 27-94, that recourse to Article 68 powers constitutes 'a discretionary act of the President, (...) an act of government which may not be subject to constitutionality check except as to the forms in which it was exercised'.<sup>78</sup> Such a pronouncement suggests an absolute immunity from jurisdiction as long as the powers are exercised within the forms prescribed by the Constitution. Considering that Article 69(2) of the Constitution further provides that Parliament will determine the period within which the President may use Article 68 powers, the Court later held, in DCC 96-023, that since the President of the Republic acquires so much power in the

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<sup>75</sup> See Arts 54 to 63 of the Constitution.

<sup>76</sup> Art 57 of the Constitution.

<sup>77</sup> See Arts 57 and 58 of the Constitution.

<sup>78</sup> DCC 27-94 of 24 August 1994.

relevant period, such powers must be exercised within the realm of Article 69.<sup>79</sup> The objective of Article 68 powers has also been specified in Article 69(1). That provision reads that ‘measures issued must be inspired by the purpose to quickly provide public and constitutional institutions the means to discharge their duties’.

Recourse to Article 68 powers has raised political tension, as its use was perceived as a window for the Executive to circumvent the Legislature’s power to control government actions. Under the 1990 Constitution, all three Presidents have had recourse to Article 68 powers. They were used either to pass the national budget or to authorise loans, despite the opposition of the majority of the day which was hostile to the government.<sup>80</sup>

## **B. The Parliament**

The Parliament of Benin has one 83-member chamber, named the ‘National Assembly’.<sup>81</sup> Members are elected by universal suffrage for four-year terms.<sup>82</sup> The National Assembly has two main functions, which are to make the law and to control government action.<sup>83</sup> It also has referral powers, in an impeachment-like procedure, for trying the President, members of the Cabinet, and their accomplices before the High Court of Justice. Members of Parliament enjoy parliamentary immunity and may not be investigated, wanted, arrested, detained, or prosecuted for opinions or votes issued in the discharge of their duties.<sup>84</sup>

Benin’s Parliament, as it has operated since 1991, has also enjoyed the stability and political pluralism brought about by the 1990 Constitution. Unlike its predecessors, which did not complete their terms, the terms of its members under the new constitutional dispensation not only have never been interrupted, but the National Assembly has also been renewed every four years.<sup>85</sup> Moreover, while the ‘Peoples’ Commissioners’ of the Marxist regime were exclusively sponsored by the ‘Party’<sup>86</sup> and merely endorsed pro-USSR Government programmes, democratic-era parliamentarians are truly the

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<sup>79</sup> See DCC 96-023 of 26 April 1996.

<sup>80</sup> For a more comprehensive discussion on the use of Article 68 powers, see Fondation Konrad Adenauer, *Commentaire de la Constitution béninoise du 11 décembre 1990: esprit, lettre, interprétation et pratique de la Constitution par le Bénin et ses institutions* (2009) 99–102 and K Somali, ‘Le parlement dans le nouveau constitutionnalisme en Afrique: essai d’analyse comparée à partir des exemples du Bénin, du Burkina Faso et du Togo’, doctoral thesis Université de Lille 2 (27 May 2008).

<sup>81</sup> Art 79(1) of the Constitution.

<sup>82</sup> Art 80.

<sup>83</sup> Art 79(2).

<sup>84</sup> See Art 90. Exceptions are provided in Article 91.

<sup>85</sup> The Bureau of Parliament has constantly been renewed, as well as the presidents of its parliamentary committees. In the first two terms, the Speakers of Parliament were not necessarily sponsored by the presidential coalition, which in fact fought their election as presidents of the National Assembly. See FJ Aivo, ‘Le Parlement béninois sous le renouveau démocratique: réussites et échecs’, RADC-CRDA Conférence annuelle sur ‘L’internationalisation du droit constitutionnel’, Rabat, Morocco (20 January 2011) 3–4 and Somali (n80).

<sup>86</sup> Members of the then ‘Assembly of the People’ were designated as follows: 90% were directly elected by the voters from a list of members of the Benin Revolutionary Peoples’ Party and 10% were appointed by the President of the Republic as one for each province.

representatives of the people who elect them directly through an open political competition.<sup>87</sup> These new constitutional processes have not only ensured competition and diversity of views and opinions, but also ethnic or regional representation. Most importantly, the new dispensation has endowed the Parliament with the necessary independence to balance the strong powers of the Executive. The fact that the Speakers of Parliament came from the ranks of opposition groups in at least two terms has also helped the National Assembly assert its independence vis-à-vis the President of the Republic.<sup>88</sup>

Although it has played the roles assigned to it under the new constitutional dispensation, Benin's Parliament has had issues of organisation and functioning. For instance, disputes have frequently raged over the Speaker's disregard for the National Assembly's Rules of Procedure. On several occasions, the requirement that parliamentary secretaries must be present during sessions of the Assembly has been either ignored or used to postpone discussions, depending on the political interests at stake. In 1998 the Constitutional Court, in DCC 98-039, had to declare unconstitutional the adoption of an amnesty law<sup>89</sup> in the absence of the secretaries, who were replaced by the Speaker with the Principal Accountant of the National Assembly, despite the opposition of the Members of Parliament.<sup>90</sup>

Another problem with the functioning of Parliament has been the tendency to resort automatically, if not too frequently, to the Constitutional Court to resolve issues that could have been dealt with by a consensual application of the Rules of Procedure. On the one hand, the tendency to abuse its institutional autonomy has led Parliament to be subject to tight scrutiny and restriction by the Constitutional Court. An illustration is given in DCC 95-016, where the Court held that the Rules of Procedure of Parliament, including a section entitled 'regulatory provisions', which were enforced before they could be reviewed by the Constitutional Court, were in violation of the Constitution because 'legally speaking, the provisions of the Rules of Procedure of the Parliament are not regulatory acts'.<sup>91</sup> On the other hand, in instances between 2006 and 2012, where the Speaker and the majority of the Bureau were sponsored by the presidential coalition, the presidential majority automatically resorted to the Constitutional Court to deal with any contradiction from minority parties within Parliament.

## 1. Law-Making Powers of the National Assembly

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<sup>87</sup> See Aivo (n85) 3–4.

<sup>88</sup> For the 1991–1995 and 1995–1999 terms of Parliament, the Speakers were sponsored by the opposition and the Bureau included members of various political groups. See Aivo (n85) at 6 and Somali (n80). Those were the years when President Soglo's bills were systematically and strongly rejected by Parliament. See Fondation Konrad Adenauer (n80) and Somali (n80) 152.

<sup>89</sup> Loi n° 98-013 relative à l'amnistie de certains faits commis entre 1990 et 1996, adopted on 20 February 1998.

<sup>90</sup> See DCC 98-039 of 1 April 1998.

<sup>91</sup> See DCC 95-016 of 14 March 1995. For some other instances in which the Constitutional Court has declared provisions of Parliament's Rules of Procedure unconstitutional see DCC 95-010 of 13 and 14 December 1994 and 21 February 1995.

Law-making primarily falls within the powers of the National Assembly, although part of such powers is vested with the President of the Republic, as discussed above. The law-making powers of Parliament include a wide range of issues such as citizenship, civic rights, fundamental freedoms, nationality, matrimonial regimes, criminal law, amnesty, organisation of the judiciary, currency, electoral law, creation of public entities, organisation of the territory, state of emergency, environment and natural resources, and property.<sup>92</sup> The National Assembly also consents to taxes.<sup>93</sup>

Ordinary legislation is adopted by a simple majority. Adoption of organic laws follows a more complicated procedure. Such laws are adopted by an absolute majority and may be promulgated after the Constitutional Court has declared them consistent with the Constitution. As the President of the Republic shares law-making powers with Parliament, government bills must seek the legal opinion of the Supreme Court and be discussed in the cabinet meeting before they are introduced.<sup>94</sup>

The national budget is adopted through a finance bill according to the law. The bill is introduced no later than a week before the October session of Parliament. If Parliament has not adopted the bill by 31 December, its provisions may be passed into law by a presidential ordinance. The government must, however, seek the ratification of such ordinances by Parliament within 15 days of their signature. In such circumstances where the finance (state budget) bill is not introduced for promulgation before the next financial year, the President of the Republic requests Parliament to implement incomes and expenditures by provisional ordinances called *douzièmes provisoires*.<sup>95</sup>

Although Parliament has improved its law-making skills over the years since 1991,<sup>96</sup> one problem has remained—the quality<sup>97</sup> and purpose of the legislative work of Benin’s National Assembly. Studies have shown that tensions arising from the constant will of the Executive to control Parliament have led the Assembly to delve more into control, thus neglecting its legislative functions.<sup>98</sup> The lack of capacity and skills, a strong politicisation of the prioritisation of issues to be discussed during sessions, and the lack of socio-economic oriented legislation have also been identified as some of the main shortfalls of the law-making activity of Parliament.<sup>99</sup>

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<sup>92</sup> See Art 98.

<sup>93</sup> See Art 96.

<sup>94</sup> See Art 105.

<sup>95</sup> See Art 111.

<sup>96</sup> According to Aivo (n85) at 5, fewer draft laws have been declared unconstitutional as Parliament has operated over the years.

<sup>97</sup> One of the most controversial laws in terms of quality is probably the Law on the Computerised Electoral Register. See DCC 11-007 of 16 February 2011, DCC 11-009 of 18 February 2011, and DCC 10-049 of 5 April 2010. See also Aivo (n85) at 19.

<sup>98</sup> See Aivo (n85) and H Adjolohoun and B Boton, ‘Etude sur l’opérationnalisation du suivi du fonctionnement de l’Assemblée Nationale du Bénin’, Rapport de consultation Cellule d’Analyse des Politiques de Développement de l’Assemblée Nationale du Bénin (November 2009).

<sup>99</sup> See Aivo (n85) at 10–12 and Adjolohoun and Boton (n98) at 15–16. For instance, most of the important laws adopted by Parliament responded to purely political calculations or followed strong demands, including civil society’s

## 2. Parliamentary Control of the Government

In the exercise of its control over the government, the National Assembly has several instruments at its disposal. These include interpellations, written questions, oral questions with or without debate followed with no vote, and parliamentary commissions of inquiry.<sup>100</sup>

Used as one of the main control mechanisms, interpellation is utilised according to Article 71. The President or any of his cabinet members may be called upon to provide explanations for on-going actions or projects implemented by the government. The President is obligated to respond personally or to instruct a minister to do so, the latter option being the most frequently used. Following the hearings, Parliament may take a resolution to make recommendations to the government.

Benin's Parliament has made effective use of its power and prerogatives to keep the government under close check. Importantly, recourse to Article 68 powers to circumvent parliamentary control has been fiercely fought by the National Assembly, especially when the majority shifted to opposition groups. One of the main cases arose during the summer of 1994, when Parliament rejected President Soglo's budget and passed a revised version that called for greater increases in wages and student grants. Determined to meet his commitments to the International Monetary Fund (IMF), President Soglo passed his version of the budget by an Article 68-based decree.<sup>101</sup> The Speaker of Parliament challenged the presidential decrees in the Constitutional Court for violation of separation of powers, as most provisions dealt with issues within the competence of the National Assembly.<sup>102</sup> In DCC 27-94, although the Court declined its competence to decide on presidential recourse to Article 68, it declared the decrees unconstitutional for failure to abide by the proper procedure.<sup>103</sup>

As far as the main control mechanisms are concerned, their effective use has, in many instances, depended on the politicisation of the work of Parliament. As a result of such politicisation, questions or interpellations were not used sufficiently or purposively, or not used at all.<sup>104</sup> The issue also seems to be that the government does not feel obligated to answer, as the Rules of Parliament which govern the process<sup>105</sup> do not provide for non-compliance situations.<sup>106</sup>

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demonstrations outside sessions of the National Assembly, as was the case for laws on corruption, domestic violence, and a computerised electoral list. Adjolohoun and Boton (n98) observed that, for instance, while parliamentary legislative activity steadily grew from 88 laws adopted in 1991 to 129 in 2007, the vast majority of such laws are initiated by the government, and relate more to loan authorisation and the functioning of Parliament than to issues that are of socio-economic relevance to the people.

<sup>100</sup> See Art 113.

<sup>101</sup> President Soglo issued Decrees 94-001 and 94-002 of 1 August 1994. See Answers.Com, 'Nicéphore Soglo' *Gale Contemporary Black Biography*, at <http://www.answers.com/topic/nic-phore-soglo>.

<sup>102</sup> These included the determination of income and expenditure, and taxes, which are primarily within the domain of the Legislature. See Arts 96 and 98 of the Constitution.

<sup>103</sup> See DCC 27-94 of 24 August 1994.

<sup>104</sup> See Adjolohoun and Boton (n98) at 15.

<sup>105</sup> See Art 113(3) of the Constitution.

## C. The Judiciary

The Constitution of Benin provides for a ‘judicial power’ (*pouvoir judiciaire*),<sup>107</sup> which includes ordinary courts and tribunals with the Supreme Court as the highest court of appeal. Article 125(2) of the Constitution provides that ‘the “judicial power” is exercised by the Supreme Court, courts and tribunals established according to the Constitution’. However, considering its position in the system, the High Court of Justice is also a highest court in Benin’s institutional landscape in its area of competence, examined below. In fact, provisions relating to the organisation, composition, functioning, and competence of the High Court of Justice are included in part II of the chapter on the Judiciary. Part I is devoted to the Supreme Court and the Judiciary.

### 1. The Supreme Court, Courts, and Tribunals

The following acts complement constitutional provisions concerning the structure, organisation, and functioning of Benin’s judiciary:

- *Loi* no 2001-37 of 27 August 2002, on the organisation of the judiciary in Benin;
- *Loi* no 2004-07 of 23 October 2007, on the composition, organisation, functioning, and competences of the Supreme Court;
- *Loi* no 2004-20 of 17 August 2007, on the rules of procedure applicable before the judicial sections of the Supreme Court; and
- the Organic law on the Judiciary.

Benin’s Judiciary includes the Supreme Court at the top, appeal courts, first instance tribunals, and tribunals of conciliation. The Supreme Court and lower courts have jurisdiction only over administrative, criminal, and financial matters. Constitutional matters fall within the competence of the Constitutional Court. From the country’s independence in 1960 to 2002, only eight courts operated for the whole country. The 2002 Act and its reform brought significant changes in the judicial scheme. The Supreme Court remains largely unmodified by the reform and has three chambers for each of its administrative, criminal, and financial jurisdictions. In turn, the new law created 28 first instance tribunals and three appeal courts in Cotonou, Abomey, and Parakou, respectively in the south, centre, and north of the country. According to the law, the administrative, criminal, and financial chambers are instituted at all three levels of the judicial system. Previously, the Administrative Chamber of the Supreme Court had exclusive jurisdiction over administrative matters.<sup>108</sup>

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<sup>106</sup> For instance, of the 50 questions put to the Government between 2007 and 2009, 11 were answered, 6 were discussed, and 3 were changed into oral questions, and more than 28 were not followed up. See Benin’s Parliament Newsletter *Hémicycle* (2008) No 005, 26–29.

<sup>107</sup> The whole title VI is devoted to the Judiciary, from Articles 125 to 138.

<sup>108</sup> For further discussion on the organisation and functioning of the Judiciary in Benin see AN Gbaguidi and W Kodjoh-Kpakpassou, ‘Introduction au Système Juridique et Judiciaire du Bénin’ (Globalex New York University, 2009), at <http://www.nvulaw.global.org/globalex/benin.html>.

In relation to the Executive, the Supreme Court plays an important role as the constitutional legal advisor to the government. The Supreme Court must issue an advisory opinion on any bill introduced by the government and provide legal opinions on any legislation or international agreement bills upon the request of the President of the Republic.<sup>109</sup> It also has jurisdiction over electoral matters for local council elections.<sup>110</sup>

As the Constitutional Court makes final decisions on constitutional matters, including constitutionality of laws, acts, and human rights issues, the question is posed as to whether decisions of the Supreme Court, which are binding on all authorities,<sup>111</sup> may be reviewed and eventually reversed by the Constitutional Court. As an illustration, a case arose in 1998 when the Supreme Court ordered the reinstatement of some of hundreds of unfairly dismissed public servants. In DCC 03-083, the Constitutional Court indirectly reversed the Supreme Court decision by deciding that the remaining civil servants should be afforded the same treatment as those who were successful in the Supreme Court case.<sup>112</sup>

The independence of the Judiciary from the two other branches of the state is primarily secured by the Constitution, which provides that the Judiciary is independent from the Executive and Legislature.<sup>113</sup> Reinforcing such independence, Article 126 provides that judges, in the discharge of their duties, are subject only to the authority of the law and that sitting judges may not be moved. In implementation of these provisions of the Constitution, the Acts governing the recruitment, training, appointment, and career management of judges further provide specific means and safeguards for their independence.<sup>114</sup> These include, for instance, provisions that judges may not be removed or appointed in a new position without their consent, even in the case of promotion.

The main issue in respect of the independence of the Judiciary thus provided by the Constitution and relevant laws is that while Article 126 of the Constitution provides that judges must obey only the law, Article 127(1) makes the President the ‘guarantor’ of the ‘independence of the Judiciary’. However, the French word used in the Constitution is not ‘*pouvoir judiciaire*’, which is the equivalent of the Judiciary, but ‘*justice*’, which should rather be understood as the fact that justice is administered, or

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<sup>109</sup> See Art 132.

<sup>110</sup> See Art 131(1).

<sup>111</sup> Art 131(2) provides that decisions of the Supreme Court are ‘binding on the Executive, the Legislature and all tribunals’.

<sup>112</sup> See DCC 03-083 of 28 May 2003, also known as the Case of 813 or 438 civil servants. In Arrêt no 33/CA of 20 November 1998, the Administrative Chamber of the Supreme Court had previously decided in the same matter that 111 of them were to be reinstated to their office by the government.

<sup>113</sup> See Art 125(1) of the Constitution.

<sup>114</sup> See Loi No 2001-37 du 27 août 2002, Portant Organisation Judiciaire en République du Bénin and Loi No 2001-35 du 21 février 2003, Portant Statut de la Magistrature en République du Bénin.

the proper functioning of justice, as in ‘the justice system’.<sup>115</sup> Article 127(2) seems to suggest that the President also sees to the independence of judges, as the provision amplifies that ‘he [the President] is assisted by the *Conseil Supérieur de la Magistrature*’ (High Council of Magistracy).

In any case, the mandate of guarantor should be understood as a duty rather than a privilege which allows the President to interfere in the functioning of the Judiciary. In DCC 07-175, the Constitutional Court confirmed such construction by holding that a presidential decree suspending execution of courts’ orders was in violation of the Constitution as it interfered with the independence of the Judiciary.<sup>116</sup> The case arose from a challenge by the *Union Nationale des Magistrats du Bénin* (Benin Magistrates Association) of the government’s decision to suspend all court proceedings as well as the execution of court orders pertaining to the enforcement of evictions in 2007.

The prohibition on interfering with the Judiciary certainly extends to the Executive as a whole, including members of the Cabinet, as well as to the Legislature. In DCC 01-018, the Constitutional Court thus held that an order by the Minister of Justice to release a detainee constituted an interference with the Judiciary and a violation of the Constitution.<sup>117</sup> In a similar case, DCC 00-005, the Court found a letter from a public prosecutor relating to a civil matter pending before the courts to be in violation of the Constitution.<sup>118</sup> The same seems to apply to the principle that judges may not be removed or moved to a new position without the observance of a minimum procedure, including prior consultation and consent. In that respect, the Court made it clear that the litigants and ordinary citizens are the final beneficiaries of the independence of judges. In DCC 97-033, a letter and decrees from the Minister of Justice which omitted to mention the proposed post were therefore declared in violation of the independence of the Judiciary and of the Constitution.<sup>119</sup> As a consequence, in DCC 06-063, the Court also declared unconstitutional the posting of a judge without his prior consent.<sup>120</sup>

The Constitutional Court has applied a similar approach in adjudicating cases relating to the appointment of judges, which Article 129 says is to be done by the President as proposed by the Minister of Justice upon the opinion of the High Council of Magistracy. The main issues were the legal nature of the Council’s opinion and at what stage of the process it must be requested. In DCC 00-054, the Court determined that the silence of the President had to be seen as a refusal to respect the

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<sup>115</sup> This meaning seems to be reinforced by Article 41 of the Constitution, which provides that the President shall also be the guarantor of national independence.

<sup>116</sup> See DCC 07-175 of 27 December 2007.

<sup>117</sup> See DCC 01-018 of 9 May 2001.

<sup>118</sup> See DCC 00-005 of 26 January 2000.

<sup>119</sup> See DCC 97-033 of 10 June 1997.

<sup>120</sup> See DCC 06-063 of 20 June 2006.

opinion of the Council and that such opposition to appointing the complainant, a judge, on the Supreme Court was in violation of the Constitution.<sup>121</sup>

## 2. The High Court of Justice

The *Haute Cour de Justice* (High Court of Justice) is mandated to prosecute the President of the Republic and members of the Cabinet for treason and other crimes committed during their term in office. The Court is composed of six Members of Parliament, who are all Constitutional Court judges except the President and the President of the Supreme Court. The issue with this court lies in its very nature, as well as in its composition, competence, and procedures. That the Court has faced difficulties in its functioning is the least that can be said. Since its inception on 15 February 2001, Benin's High Court of Justice has failed to hear even one case, although this is not for lack of actual and potential opportunities.

The first issue is the composition of the Court, and the fact that referral is left exclusively to Parliament. Decisions to investigate and then indict are reached by a two-third majority vote.<sup>122</sup> One is therefore not surprised at the timidity of members of the Executive and Parliament to turn their political allies and former colleagues over to such a political tribunal. Four cases referred to the Court by President Yayi Boni's '*régime du changement*' between 2007 and 2011 were met with rejection among parliamentarians, as the accused were former Members of Parliament or pro-presidential majority political leaders.<sup>123</sup> Another issue concerning the High Court of Justice is the process through which its members are designated. Besides the direct involvement of the President of the Republic in the designation, Members of Parliament have the power to barely refuse to refer cases to the Court or to simply delay the designation of their representatives to the tribunal. For instance, between 2007 and 2009, Parliament delayed the designation of its members to the third batch of High Court of Justice judges for two years, with no specific reasons.<sup>124</sup> Notably, some sitting Members of Parliament at the time were targeted by the Executive's application for referral. However, the dispute equally involved political representation within Parliament, and the bid by long-marginalised opposition groups to take their revenge on the presidential majority. The Constitutional Court was eventually called upon to settle the dispute, in DCC 09-02 where it ordered Parliament to designate its representatives to the High Court of Justice within six days of its decision.<sup>125</sup>

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<sup>121</sup> See DCC 00-054 of 2 October 2000.

<sup>122</sup> See Art 137.

<sup>123</sup> See Afriqinfos, 'Bénin: le dossier de poursuite d'un ancien ministre devant la haute cour de justice est rejeté par le parlement', at [<http://www.afriqinfos.com/articles/2012/5/24/benin-dossier-poursuite-dun-ancien-ministre-devant-haute-cour-justice-rejete-parlement-203014.asp>] and Adjinakou, 'Poursuite devant la haute cour de justice Nouveau casse-tête pour anciens ministres', at [<http://www.journal-adjinakou-benin.info/?id=4&cat=1&id2=9648&jour=03&mois=11&an=2011>].

<sup>124</sup> See P Zinsou-Ply, 'Bénin: Désignation des représentants du parlement à la Haute Cour de justice – Une 6ème session extraordinaire se négocie' (27 Septembre 2007), at [<http://fr.allafrica.com/stories/200709280692.html>].

<sup>125</sup> See DCC 09-002 of 8 January 2009.

From the legal standpoint, the lack of a specific law for the High Court of Justice to operate effectively is compounded by the constitutional silence on who may apply to Parliament for referrals. One consequence is that the two initial cases of former ministers properly referred to the Court were frozen by legal technicalities. The other inevitable consequence is that the ‘political tribunal’ is turning into a political weapon that both the President of the Republic and Parliament are believed to use against opponents.<sup>126</sup> Due to the personal jurisdiction of the High Court of Justice, it may be assumed that referral lies with the President of the Republic as the head of the Executive. The problem with this assumption is that the prerogative to move a political and economic crimes mechanism is left with those most likely to be probed.

## V. Decentralisation / De-concentration

Benin is a unitary state which adopted a hybrid local government model with a mixture of de-concentration and decentralisation. Decentralisation has been experienced in Benin since 2002. Six Prefects represent the central government at departmental levels, whereas 77 communal entities are ruled by representatives of the people directly elected by them.

As part of this decentralisation, the Constitution provides for ‘territorial communities’,<sup>127</sup> allowing the people to participate in their own affairs through local entities. These entities are freely managed by elected councils<sup>128</sup> and they enjoy budgetary independence vis-à-vis the state.<sup>129</sup> However, the state is obligated to see to the harmonious development of communities on the basis of national solidarity, the potentialities of the regions, and equity between different regions.<sup>130</sup> As far as de-concentration is concerned, executive power is decentralised through 12 provinces. Prefects are appointed by the President of the Republic to represent the central government in each province. Five main Acts organise decentralisation in Benin:

- *Loi* no 97-028 of 15 January 1999, on the general framework of territorial organisation;
- *Loi* no 97-029 of 15 January 1999, on the functioning of local entities, their missions, competences, organisation, and external relations;
- *Loi* no 98-007 of 15 January 1999, on the financial regime of local entities, and their budgetary affairs;
- *Loi* no 98-006 of 9 March 2000, on electoral matters; and
- *Loi* no 98-005 of 15 January 1999, on local entities with special status, which are currently the three most populous and also the most developed cities of the country.

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<sup>126</sup> See, for instance, All Africa, ‘Bénin: Adihou devant la Haute Cour pour avoir osé insulter les députés’, at <http://fr.allafrica.com/stories/200607190590.html>. The case involved the former minister of relations between the institutions and education in the government of President Mathieu Kerekou. The minister was released after a three-year remand, without being charged.

<sup>127</sup> Art 150 of the Constitution.

<sup>128</sup> Art 151 of the Constitution.

<sup>129</sup> Art 152 of the Constitution.

<sup>130</sup> Art 153 of the Constitution.

Local entities are funded from three main financial sources: direct transfers from the state, shared taxes, and exclusive communal resources, including communal taxes. Seven competences have been transferred from the state to communal entities:

- Local development, habitat, and urbanism;
- Infrastructure and transport;
- Environment;
- Basic and maternal education;
- Literacy and adult education;
- Health, social, and cultural services; and
- Merchant services and economic investments.

Other areas fall within the competence of the central government, represented by the Prefect in a particular province.

## **VI. Constitutional Adjudication**

### **A. Jurisdiction of the Constitutional Court**

As discussed above, the Constitution of Benin provides for a separate Constitutional Court which is not under the Judiciary. The Constitutional Court is endowed with wide powers in relation to political and social governance. Firstly, the Court controls the constitutionality of laws, all acts, decisions, and actions of the Executive and its agencies, Parliament, and the Judiciary. Secondly, it adjudicates all matters relating to the functioning of state organs including organisation, operation, appointment, or designation and dismissal of members of those institutions. Thirdly, all disputes between branches of the state and the relationships between the same fall within the jurisdiction of the Constitutional Court. Fourthly, it has jurisdiction over cases of human rights violations. Finally, the Constitutional Court adjudicates disputes arising from presidential and parliamentary elections.

Constitutional review is the exclusive function of the Constitutional Court of Benin. Article 114 of the Constitution provides that ‘[t]he Constitutional Court shall be the highest court of the state in constitutional matters. It shall be the judge of the constitutionality of the law ...’. Constitutional review is compulsory for organic and general laws before their promulgation, for rules of procedure of Parliament, the Media and Communication Authority, and the Social and Economic Council before their application, for laws and regulations likely to breach fundamental human rights and freedoms, and for conflicts arising from distribution of power between state organs.<sup>131</sup> Constitutional review may

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<sup>131</sup> See Art 117.

be initiated both *a priori*, before the impugned bill or regulation is enacted, and *a posteriori*, when an existing law is brought to constitutional scrutiny.

Competence to initiate constitutional review is shared between the President of the Republic, Members of Parliament, and ordinary citizens. Article 121(1) allows the President of the Republic and any Member of Parliament to seek constitutional review of any laws before their promulgation. In case any such laws are likely to infringe human rights, the Court has the power under Article 121(2) to automatically initiate review. Finally, individuals are empowered under Article 122 to directly challenge the constitutionality of any bill or enacted law before the Constitutional Court when they believe such law is not consistent with the Constitution. As mentioned earlier, an indirect mechanism also allows individuals to use the *exception d'inconstitutionnalité*. As indicated above, the procedure allows a party to a case pending before ordinary courts to challenge the constitutionality of any law invoked therein. The court hearing the matter must suspend the proceeding pending the decision of the Constitutional Court.

The organic law on the Constitutional Court also extends the power to move constitutional review of laws likely to infringe human rights to the President of the Republic, and most importantly to any association or non-governmental human rights organisations.<sup>132</sup> These provisions have helped the Court develop quite liberal and generous practices in relation to constitutional review and human rights litigation.<sup>133</sup>

### **B. Appointment and Independence of Constitutional Court Judges**

Of the seven members of the Constitutional Court, four are appointed by the Bureau of the National Assembly and three by the President of the Republic, for a five-year term renewable only once.<sup>134</sup> Criteria for nomination include professional competence, moral decency, and great probity. The Constitution also ensures a balanced composition of the Court between legal experts and non-lawyer members. Any bench of the Court must therefore include at least three professional judges with 15 years of experience, two being appointed by the Bureau of the National Assembly and one by the President. Nominations must include two legal experts, who are ‘professors of law or legal practitioners’, with 15 years of experience, each appointed by the National Assembly and the President of the Republic. Exactly the same rules apply for the appointment of the two remaining members of the Court, who must be chosen from a list of top civil servants, who are ‘personalities of established

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<sup>132</sup> Article 22 of the *Loi Organique sur la Cour constitutionnelle*.

<sup>133</sup> See in general N Mede, *Les grandes décisions de la Cour constitutionnelle du Bénin* Editions Universitaires Européennes (2012).

<sup>134</sup> Art 115 of the Constitution.

professional renown'.<sup>135</sup> Members of the Court elect its President from among the professional judges and legal expert members. Petitioned as to who is a legal expert or '*juriste de haut niveau*', the then High Council of the Republic confirmed the letter of Article 115 of the Constitution in Decision No 8 DC: 'The legal expert must inevitably be a professor or legal practitioner'.<sup>136</sup>

Article 115 of the Constitution also provides for important safeguards to guarantee the independence of Constitutional Court judges. Accordingly, they cannot be removed from office during their term and may not be investigated or arrested without the authorisation of the Constitutional Court and the Bureau of the Supreme Court sitting in a joint session, except in 'flagrant cases'.<sup>137</sup> In such cases, the Presidents of the Constitutional Court and Supreme Court must be seized within 48 hours of the arrest. Constitutional Court judges also enjoy immunity of jurisdiction similar to that of judges of ordinary courts.

### **C. Interpretation and Development of the Constitution**

One of the most important principles developed by the Constitutional Court in application of the 1990 Constitution is the '*principe à valeur constitutionnelle*'.<sup>138</sup> The '*principes à valeur constitutionnelle*' are considered to be so central to the supremacy of the Constitution that their amendment or infringement would amount to threatening the survival of the whole system. Therefore, the Court has made it of paramount importance that the considered provisions of the Constitution ought to be strictly upheld and may be amended or revised only through a popular consultation or with the involvement of all branches of the state. Most of the cases in which the Court has applied the '*principe à valeur constitutionnelle*' are concerned with keystones of Benin's new constitutionalism.<sup>139</sup> Some of them are worth discussing.

#### **1. Political Disputes and Democracy**

In the discharge of its mandate to adjudicate disputes between branches of the state, the Constitutional Court of Benin has had to deal with the political 'majority – minority' question. The question arose in a dispute between the government and Parliament on the representation of political parties in the Bureau of Parliament and its commissions. In 2009, the Court decided that the political minority is

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<sup>135</sup> In practice, those personalities have always been chosen from among top civil servants with more than 10 years' experience in public administration.

<sup>136</sup> See Decision 8 DC of 16 June 1992, which was confirmed by Decision 15 DC of 16 March 1993. In Francophone Africa, the title of professor is granted upon a successful participation in the notoriously selective *Agrégation* exam organised by the *Conseil Africain et Malgache de l'Enseignement Supérieur* (CAMES). Formal conditions to apply for the exam include holding a doctoral degree and having published a couple of articles in accredited journals.

<sup>137</sup> See Section III.C on the enforcement of constitutional courts' decisions.

<sup>138</sup> The principles of constitutional rank, character, or value.

<sup>139</sup> See R Dossou, 'La Cour Constitutionnelle du Bénin: l'influence de sa jurisprudence sur le constitutionnalisme et les droits de l'homme' (paper presented at the World Conference on Constitutional Justice, Cape Town, 23–24 January 2009) 10–12. Advocate Dossou is a senior advocate and former Head of Benin's Bar, a Law Professor, and the President of the Constitutional Court of Benin (2008–2013).

entrusted with rights in Parliament since the principle of ‘the winner takes all’ is not acceptable in a democratic society. In DCC 09-002 the Court thus raised the rights of the political minority, which it defined as the party or coalition of parties with the least number of members in Parliament, as a ‘*principe à valeur constitutionnelle*’.<sup>140</sup> At the time of the decision, members of the Court were believed to be favourable to the presidential coalition which had just lost the majority of seats in Parliament.

Surprisingly, the Constitutional Court, with the same composition, overturned its precedent two years later in the same circumstances, the presidential coalition having re-secured the majority of the seats. In 2011, the Court held in DCC 11-047 that proportionality must be determined *in casu*, and the ‘majority – minority’ notion must be ‘enlightened’ by the *summa divisio* ‘presidential coalition versus opposition’.<sup>141</sup> Such a jurisprudential move led opposition groups in Parliament—the minority of the day—to blame the constitutional tribunal for devaluing the ‘minority principle’ to the rank of a ‘*principe à géométrie variable*’.<sup>142</sup> Critics went as far as suggesting that the Court had positioned itself as a *de facto* second chamber of Parliament.<sup>143</sup>

The move of the Constitutional Court to flesh out the right to political representation in Parliament seems to have caused more problems than it was initially intended to resolve. This is more so where previous compositions of the Court had consistently held, starting from DCC 03-168, decided in 2003, that the Parliament has discretionary powers to decide how its internal elections should be conducted, as long as the ballot is secret and candidates are Members of Parliament.<sup>144</sup> Changing constructions of the Constitution on grounds that are or perceived to be political may attract the risk of legal and constitutional insecurity. It also has the potential to diminish citizens’ trust in the Court and the constitutional system as a whole. Opposition groups have indeed fiercely criticised the Court for trespassing upon the Legislature’s domain by forcing and basically dictating how the Bureau of Parliament should be composed.

However, one should embrace caution in a critical analysis of what may well be termed as ‘political question’ cases.<sup>145</sup> Although under constitutional review, the Constitutional Court of Benin had, as early as in 2000, considered political representation and participation as central to pluralist democracy,

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<sup>140</sup> See DCC 09-002 of 8 January 2009.

<sup>141</sup> See DCC 11-047 of 21 July 2011.

<sup>142</sup> The term is used to mean ‘a principle that moves according to the minority or the majority of the day’. On a critical analysis of DCC 09-002 of 8 January 2009 and the ‘*principes à valeur constitutionnelle*’, see S Bolle, ‘Décision DCC 09-002: le bon grain et l’ivraie’, at [<http://www.la-constitution-en-afrique.org/16-categorie-10195442.html>].

<sup>143</sup> See Aivo (n85) at 14.

<sup>144</sup> See for instance DCC 03-168 of 26 November 2003 and DCC 01-13 of 29 January 2009.

<sup>145</sup> See, for instance, in general E Nwauche, ‘Is the end near for the political question doctrine in Nigeria?’, in C Fombad and C Murray (eds), *Fostering Constitutionalism in Africa* (2010) PULP and A Kpodar, ‘Décision de la Cour constitutionnelle du Bénin DCC 09-002 du 8 janvier 2009: une bonne année à la démocratie pluraliste’, in S Bolle, *La Constitution en Afrique*, at [<http://www.la-constitution-en-afrique.org/article-28611580.html>].

as well illustrated in DCC 00-078.<sup>146</sup> The same concern has led the Court to emphasize the need for pluralist democracy to ‘combine political configuration, equity and proportionality’ while dealing with representation in any organ established by virtue of the Constitution, including National and Departmental Electoral Commissions, as was the case in DCC 01-011.<sup>147</sup> In fact, the Constitutional Court has filled the silence of the law about how political parties should be represented in various organs and bodies by crystallising its longstanding precedent in DCC 09-002. This decision of the Court is also important in strengthening Benin’s democracy, as it clearly differentiates political minority in Parliament from parliamentary opposition, whose purpose is to criticise the policies of the incumbent government and propose viable political alternatives.

## 2. Amendment of the Constitution

Just like any other constitution, Benin’s Constitution of 1990 may be amended under certain conditions. In turn, what the fundamental law does not say is whether ‘non-consensual’ revision is in violation of the spirit of the Constitution. The Constitutional Court of Benin has responded by carving consensual revision in stone. In 2006 and 2007, the Court dismissed unilateral attempts to amend the Constitution on the grounds that the fundamental law had been adopted by the people through a national consensus reached at the 1990 National Conference. The landmark decision of the Constitutional Court on that line is without doubt DCC 06-074, where the Court held that such national consensus had become a ‘*principe à valeur constitutionnelle*’, which ought to preside over any amendment of the Constitution. The case concerned an amendment effected by Members of Parliament within closed doors to extend their term of office from four to five years.<sup>148</sup> In the view of the Court, the principle of ‘national consensus’ was adopted by the February 1990 National Conference which also gave birth to the December 1990 Constitution, and any amendment of the Constitution should follow the public and open process adopted by the Conference. The Court thus declared the term ‘extension’ contrary to the Constitution.<sup>149</sup>

Issues surrounding the revision of Benin’s 1990 Constitution have, however, evolved beyond merely how amendments must be undertaken. In fact, the issue was firstly whether the Constitution should be amended at all, especially if only to serve personal political purposes and ambitions. Civil society and the Constitutional Court initially fought so-called opportunistic amendments in 2006 and 2007.<sup>150</sup> The

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<sup>146</sup> See, for instance, DCC 00-078 of 7 December 2000. For a comprehensive discussion of the pluralist democracy and representation jurisprudence of Benin’s Constitutional Court, see Kpodar (n145).

<sup>147</sup> See DCC 01-011 of 12 January 2001.

<sup>148</sup> See Mediatrice.net, ‘Bénin: bataille autour de la révision de la Constitution’ (4 July 2006), at [\[http://www.mediatrice.net/modules.php?name=News&file=print&sid=1176\]](http://www.mediatrice.net/modules.php?name=News&file=print&sid=1176).

<sup>149</sup> See DCC 06-074 of 8 July 2006.

<sup>150</sup> For a detailed analysis of constitutionalism and the debate on the revision of the Constitution in Benin see, in general, H Adjolohoun, ‘Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and the Dilemmas of Revising the 1990 Constitution in Benin’, in MK Mbondenyei et al (eds), *Constitution Making, Constitutionalism and Constitutional Reform in Africa: Contemporary Perspectives from Sub-Saharan Africa* (submitted for publication by PULP in 2012).

‘Do Not Touch My Constitution’ social movement, which was launched as early as in 2004, led to a country-wide rejection of any revision in 2006, the final year of former President Mathieu Kérékou’s second term under the democratic regime. Social uprisings led the Constitutional Court to decide, in DCC 05-139 and DCC 05-145, that the economic arguments used to seek amendments of the Constitution and to extend presidential terms were not constitutionally justified.<sup>151</sup> Subsequent developments around the constitutional revision project that were ‘officially’ launched in 2008 attest to the importance of the position of the Constitutional Court regarding opportunistic amendments to the supreme law of the land.

#### **D. Powers of the Constitutional Court**

There is no doubt that decisions of the Constitutional Court are final and binding on all state organs, individuals, and non-state entities. Whether the parties in a particular case comply with such decisions is another issue altogether. No particular issue has arisen in respect of individuals or private parties complying with the decisions of the Court so far. The same cannot be said of state organs.

As alluded to above, one problem with the powers of Benin’s Constitutional Court has indeed been whether the Court may issue orders or make injunctions when it has found state organs to be in violation of the Constitution or in the situation of non-compliance with its decisions. As discussed under Section VI.A, the Court has taken a progressive approach to reparation of human rights violations. With regard to other decisions of the Constitutional Court, compliance by the government is poor. Initially, the Court made it clear that it could not make orders pertaining to the government without breaching separation of powers, as illustrated in a number of decisions starting from DCC 95-024, decided in 1995.<sup>152</sup> However, this position has evolved in subsequent decisions where the Court has made pronouncements in the form of clear injunctions, for instance that the ‘complainants [must] be reinstated’,<sup>153</sup> thus making orders for the performance of specific actions, as was the case in DCC 05-067, without even expressly indicating the addressee of such order.<sup>154</sup>

The Constitutional Court seems to have had a better influence over securing compliance of Parliament. For instance, in DCC 03-077, decided in 2003, the Court held that multiple suspensions by the dean—the oldest sitting Member of Parliament—during the election of the Bureau of the National Assembly were in violation of the Constitution. The Court thus ordered that ‘the “dean” [call] a meeting of the Parliament and [proceed] to have the bureau elected during the same session; failing which, the dean should be replaced by the next oldest [Member of the Parliament] until the process is completed within

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<sup>151</sup> See Constitutional Court decisions DCC 05-139 of 17 November 2005 and DCC 05-145 of 1 December 2005.

<sup>152</sup> See for instance DCC 95-024 of 6 July 1995, DCC 95-029 of 17 August 1995, DCC 03-003 and DCC 03-004 of 18 February 2003, DCC 03-052 of 14 March 2003, and DCC 03-083 of 28 May 2003.

<sup>153</sup> Emphasis added.

<sup>154</sup> See for instance DCC 05-067 of 12 January 2005 and DCC 06-016 of 31 January 2006.

48 hours of the decision'.<sup>155</sup> The decision was complied with. In 2004, the Court made a similar order when eight members of the Economic and Social Council decided to block the election of their bureau by boycotting the session. The Court ordered in DCC 04-065 that the session be called and elections be completed within 72 hours of its decision.<sup>156</sup> In 2008, the Constitutional Court also found the decision of Parliament to postpone *sine die* the adoption of a bill authorising the government to make loans for coastal erosion projects to be in violation of the Constitution.<sup>157</sup> After protesting that the decision breached separation of powers, Parliament eventually adopted the bill as prescribed by the Court in DCC 08-072.

## VII. International Law and Regional Integration

### A. International Law

Benin adopts a monist system as its Constitution provides that international law becomes part and parcel of the municipal law upon ratification and publication.<sup>158</sup> While ratification binds the state, the purpose of publication is to ensure presumption of awareness of the treaty by everyone.<sup>159</sup> Although issues surrounding non-publication may be regarded as domestic technicalities, the Constitutional Court of Benin has excluded the applicability of treaties for lack of publication, in DCC 03-009.<sup>160</sup>

There is no mention in the Constitution of the role and place of customary rules in the domestic legal system. With regard to precedence, Article 147 of the Constitution provides that ratified international law has an authority that is 'superior to that of the [municipal] law'. The supra-legislative rank of international law is not disputed. In turn, there has been an issue as to whether the law referred to includes the Constitution. In the case of Benin, while the place of such an instrument as the African Charter is justified by its constitutional incorporation and use by the Constitutional Court, the same cannot be said of other international human rights instruments. For instance, the use of the latter in domestic courts is scarce and the Constitutional Court has almost never referred to them since 1993. The constitutional rank of the African Charter is exemplified at least by the fact that the Constitutional Court, based on constitutional incorporation, generally finds solely that the Constitution has been violated after referring to both the African Charter and the Constitution in its arguments.<sup>161</sup>

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<sup>155</sup> See DCC 03-077 of 7 May 2003.

<sup>156</sup> See DCC 04-065 of 29 July 2004.

<sup>157</sup> See DCC 08-072 of 25 July 2008.

<sup>158</sup> See Art 147 of the Constitution. Reciprocal application by the other party is an additional condition set by the Constitution.

<sup>159</sup> See A Sow Sidibé, 'Communication introductive générale', in AA-HJF, (ed) *Actes du colloque international sur l'application du droit international dans l'ordre juridique interne des Etats africains francophones* (2003) 54.

<sup>160</sup> In DCC 03-009 of 19 February 2003, the Constitutional Court held that provisions of the Convention on the Rights of the Child did not apply in Benin for lack of publication, even though Benin had ratified the convention. For a more comprehensive discussion of international (human rights) law litigation in Benin, see M Killander and H Adjolahoun, 'International law and domestic human rights litigation in Africa: An Introduction', in M Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (2010) PULP.

<sup>161</sup> See Adjolahoun (n34).

Arguments have been developed for and against international law's precedence over the Constitution. In the case of Benin, the Constitution provides that when the Constitutional Court has declared that a provision of an international agreement is not in accordance with the Constitution, authorisation to ratify may be granted only after an amendment of the Constitution.<sup>162</sup> If the Constitution has to be changed to conform to in-coming international law, it may be said that the latter has precedence over the former. However, one could also argue that the Constitution supersedes international law since the place of the latter in the hierarchy of norms is determined by the former.

Treaties are negotiated, signed, and ratified by the President of the Republic<sup>163</sup> but ratification may intervene only after approval of Parliament<sup>164</sup> and after the Constitutional Court has declared such treaty in conformity with the Constitution.<sup>165</sup> There is a category of treaties which the President of the Republic may ratify only with the consent of Parliament. Article 145 of the Constitution thus provides that treaties involving peace, international organisation, state finance, those modifying domestic regulations, and those including rescission, exchange, or adjunction of territory, may be ratified only by virtue of the law. Compatibility and harmonisation are therefore assured not only by the Constitutional Court but also by the Supreme Court, although under an advisory mechanism. An interesting illustration is provided by the Supreme Court Legal Opinion No 029-C of 25 July 2003 on the compatibility of an executive request for ratification of the Rome Statute of the International Criminal Court and previous international commitments made by Benin.<sup>166</sup> The Supreme Court was of the opinion that '[t]he government of Benin could not enter into the bilateral agreement as proposed by the US government without compromising its commitments under the Rome Statute'.<sup>167</sup> The opinion led Benin's government to repudiate the proposed impunity agreement, despite threats by the United States to withdraw military aid to the country, which the US government eventually implemented.<sup>168</sup>

## **B. Regional Integration**

The Constitution expresses the commitment of the country to realise African unity.<sup>169</sup> Benin is a member of several regional integration organisations, including the Economic Community of West African States (ECOWAS), the Economic and Monetary Union of West Africa (UEMOA), and the Organisation of the Harmonisation of Business Law in Africa (OHADA). Accession to regional treaties is governed by the same rules as for international treaties.

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<sup>162</sup> See Art 146 of the Constitution.

<sup>163</sup> See Art 144.

<sup>164</sup> See Art 145.

<sup>165</sup> See Art 146.

<sup>166</sup> See Legal Opinion on the Compatibility of the Bilateral Agreement Between the Governments of the United States and Benin with Article 98 of the Rome Statute of the International Criminal Court, Legal opinion, Case number 029-C, ILDC 844 (BJ 2003), 25 July 2003, in *International Law in Domestic Courts*.

<sup>167</sup> ILDC 844 (BJ 2003) (n166), para H4.

<sup>168</sup> See Afrol News, 'US suspends military aid to Benin', at <http://www.afrol.com/articles/10423>.

<sup>169</sup> Preamble of the Constitution, para 6.

While Article 148 of the Constitution provides that Benin may enter any cooperation agreement with other states, the same provision clarifies that cooperation shall be governed by principles such as equality, mutual respect of sovereignty, reciprocal benefits, and national dignity. Article 149 goes further to provide that regional or sub-regional integration agreements may be entered within the limits of Article 145. Article 145 in turn puts more stringent restrictions on Benin's adherence to treaties involving peace, international organisation, state finance, those modifying domestic regulations, and those including rescission, exchange, or adjunction of territory.

It is accepted that through ratification of international treaties, especially those adopted in the framework of regional integration, states 'release' part of their sovereignty to the community.<sup>170</sup> An interesting example is provided by the OHADA reform involving 16 African countries, including Benin. To meet the needs of integration and harmonisation, the OHADA Treaty provides for both the direct applicability of uniform acts on the territory of member states and the domestic enforcement of decisions made by the OHADA Court of Justice and Arbitration under the same conditions as for national courts' judgments. Called upon to decide whether the OHADA Treaty was in conformity with the Constitution, the Constitutional Court held in DCC 19-94 that although entering the Treaty would result in some relinquishment of sovereignty, such relinquishment is in accordance with the Constitution, the preamble of which reiterates the people's attachment to African unity and endeavours to realise regional integration. The Court therefore took the position that the country could ratify the Treaty as long as the relinquishment involved is neither total nor unilateral and is authorised by the law.<sup>171</sup>

### **VIII. Concluding Remarks**

That Benin's 1990 Constitution has brought about political and constitutional stability to the country is undisputable. Firstly, the new Constitution has laid the foundations for an effective constitutionalism grounded in constitutional provisions for democracy, the rule of law, separation of powers, and human rights. Secondly, although the new constitutionalism inaugurated by the 1990 Constitution has faced the challenges of a strong presidentialism, the establishment of a purposely empowered Constitutional Court has been instrumental in keeping the problems within acceptable proportions. For instance, the constant tendency of the Executive to assert its domination over the Judiciary through the extended powers of the President of the Republic has been limited by the Constitutional Court. The Court has thus been central to helping Benin address one of the fundamental preoccupations of modern constitutionalism—that is, to 'limit governmental power in order to counter the evils of arbitrariness'.<sup>172</sup>

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<sup>170</sup> See in general A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge 1995).

<sup>171</sup> See DCC 19-94 of 30 June 1994.

<sup>172</sup> Fombad and Inegbedion (n7).

However, one of the unique features of the constitutional model shaped by Benin's 1990 Constitution is certainly the 'generous' access to its Constitutional Court, including by individuals and groups, not only to vindicate constitutional rights but more importantly to challenge the constitutionality of laws and acts of state and its agencies. Through its extensive powers, the Constitutional Court has consequently played a critical role in both maintaining the whole constitutional edifice and ensuring a constitutionalism that is consistent with the aims of the 1990 National Conference. An ingenious inauguration of the '*principes à valeur constitutionnelle*', among others, to save the country from the lurking dangers of opportunistic revisions of the Constitution for the purposes of elongation of presidential terms, attest to the vitality of Benin's constitutionalism. The same has been done to protect political rights to representation in Parliament and other organs established by the Constitution. With no surprise, an evolving development of the Constitution by the Court has strengthened constitutionalism and positioned the country as a democratic model.

Yet some important questions have also emerged from the practice of the Constitution and relate to whether the fundamental law still meets the changing needs of the people of Benin. On the one hand, as discussed above, the development of constitutional principles by the Constitutional Court from 2006 has raised controversies, especially with regard to political representation and public confidence in both the Constitution and the Court. On the other hand, non-consensual amendments and proposed revision of the Constitution have sparked disputes regarding when, how, and what to revise.

Opposition of non-state actors to constitutional revision under President Kérékou's democratic regime has been discussed above. In 2008, President Boni Yayi's 'regime of change' sponsored a more open process to 'read the Constitution in order to correct the imperfections that arose from two decades of practice'.<sup>173</sup> Although the project pledged not to revise provisions for 'the rule of law, liberal democracy, the Republic, integral multi-party system, presidential regime, presidential term and age limits',<sup>174</sup> the final process lacked openness<sup>175</sup> and the transmission of the bill to Parliament was done through a controversial and almost secret procedure.<sup>176</sup> In any case, serious issues seem to dwell in the very changes sought by the executive bill. One such change seeks to limit to two months the time-frame within which Parliament must pass executive bills. The problem with the proposal is that it immediately followed a rejection by Parliament of various controversial bills tabled by the government. Another executive proposal is to extend the jurisdiction of the Constitutional Court to the

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<sup>173</sup> Presidential Decrees No 2008-525 of 18 February 2008 and No 2008-597 of 22 October 2008, setting up the Constitutional Commission.

<sup>174</sup> Para 6 of the *Exposé des motifs*, Presidential Decree No 2009-548 of 3 November 2009, transmitting to the National Assembly a bill with the effect of revising the Constitution of the Republic of Benin.

<sup>175</sup> See M Hounkpè, 'Limites du projet de révision de la Constitution du 11 décembre 1990', in Fondation Konrad Adenauer, *Projet de révision de la Constitution béninoise: portée et limites* (2010) 53–60.

<sup>176</sup> Hounkpè (n175).

review of ordinary courts' decisions, including the Supreme Court. Again, the suggested amendment came as a response to the suspension of courts' orders in 2007 and the government's constitutional suit initiated in 2012 to limit the right of judges to go on strike.<sup>177</sup>

Some other issues raised in the context of the on-going constitutional revision process include the involvement of the Constitutional Court in presidential and legislative elections, especially in the light of the growing public perception about the 'politicisation' of the Court. Considering the fact that the Court is perceived to have abused its powers to act *proprio motu* in election observation, one would have expected a constitutional revision to re-balance powers by providing for a less disproportionate mechanism. The bill failed to do so. The same applies to the proposal to vest the enforcement of the Constitutional Court's human rights decisions with ordinary courts. Lastly, there was no change to the membership of the Superior Council of Magistracy, which is still headed by the President of the Republic and includes the Minister of Justice.

Despite controversial proposed amendments, the constitutional bill has the intention of resolving some of the key issues of concern to the people of Benin. The bill excludes the two-term limit from revision, and prohibits any revision that is not endorsed through popular consultation and referendum. The project abolishes the death penalty and makes economic crimes and crimes against humanity imprescriptible, criminal law being retroactive for such offences. Pre-trial detention is also limited to 18 months.

However, the overall analysis of the Executive's project reveals that it seeks to cut off even more of the powers of both the Judiciary and the Legislature to reinforce the powers of the President of the Republic. Instead of balancing the distribution of powers to moderate the currently strong *presidentialism*, the bill envisages a 'presidential monarchy' or '*monocracy*'.<sup>178</sup> Faced with a country-wide campaign led by academia, civil society, trade unions, and political opposition groups against what they considered to be a secret and opportunistic revision of the Constitution, the President withdrew the bill in June 2012.<sup>179</sup>

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<sup>177</sup> See Le Matinal, 'Suite au dernier mouvement de débrayage dans le secteur judiciaire: Gbèdo pour une restriction du droit de grève des magistrats', in Sonagnon, at [[http://www.sonangnon.org/index.php?option=com\\_content&view=article&id=4148:suite-au-dernier-mouvement-de-debrayage-dans-le-secteur-judiciairegbedo-pour-une-restriction-du-droit-de-greve-des-magistrats&catid=1:actualite](http://www.sonangnon.org/index.php?option=com_content&view=article&id=4148:suite-au-dernier-mouvement-de-debrayage-dans-le-secteur-judiciairegbedo-pour-une-restriction-du-droit-de-greve-des-magistrats&catid=1:actualite)]. President Yayi's Minister for Justice seized the Constitutional Court on the grounds that the right of judges to go on strike violates human rights, the rights of detainees, and access to justice. See M Zoumènou, 'Gbèdo veut attiser un nouveau feu dans le secteur judiciaire', in *La Nouvelle Tribune* (22 March 2012), at [<http://www.lanouvelletribune.info/index.php/actualite/une/10428-gbedo-veut-attiser-un-nouveau-feu-dans-le-secteur-judiciaire>].

<sup>178</sup> See J Djogbénou, 'L'idée de réforme de la Constitution béninoise du 11 décembre 1990: entre progrès et regrets', in Fondation Konrad Adenauer, *Projet de révision de la Constitution béninoise: portée et limites* (2010) 17–51.

<sup>179</sup> See Koaci, 'BENIN: Boni Yayi retire la révision de la Constitution du Parlement, et rassure sur son départ en 2016', at [<http://koaci.com/articles-74730>].

It is yet to be seen whether and how the people of Benin and its institutions will remain vigilant in sustaining democratic stability through an enhanced constitutionalism and a constant preservation of the Constitution and separation of powers against 'executive assaults'. The challenge is to strike the right balance between the imperative of jealously protecting a Constitution that has never been amended in more than two decades, and the need to adjust some provisions to overcome the difficulties that Benin's constitutionalism encounters in practice.

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